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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-223

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

BAPTIST HOSPITAL, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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Baptist Hospital, Inc. files this its Brief in Opposition to the National Labor Relations Board's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.[1]

[1] The opinion of the Court of Appeals for the Sixth Circuit is reported at 576 F2d 107 (1978). For convenience, the Petitioner National Labor Relations Board, is hereinafter referred to as the "Board"; and the Respondent, Baptist Hospital, Inc., is hereinafter also referred to as the "Hospital". References to the record in this case are made to the appendix in the Court of Appeals below, hereinafter referred to as the "Appendix", followed by the page number of this Appendix containing the referenced portion of the record.

QUESTION PRESENTED

Whether the Court of Appeals for the Sixth Circuit erred in concluding on the basis of the record before it that substantial evidence failed to support the Board's finding that Baptist Hospital's no-solicitation rule prohibiting employees from soliciting other employees for any purpose during non-working time in areas of the Hospital which are accessible to patients and their visitors violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1).

REASONS FOR DENYING THE WRIT

As accurately recounted in the Board's Brief in support of its Petition, the instant case closely resembles *Beth Israel Hospital v. National Labor Relations Board*, 93 S.Ct. 2463 (1978), in which this Court affirmed the First Circuit Court of Appeals' decision enforcing a Board order finding Beth Israel Hospital's similar[2] no-solicitation rule violative of Section 8(a)(1) of the National Labor Relations Act. *See NLRB v. Beth Israel Hospital*, 554 F2d 477 (1st Cir. 1977). *Accord, Lutheran Hospital of Milwaukee, Inc. v. NLRB*, 564 F2d 208 (7th Cir. 1977), *vacated and remanded*, No. 77-1289, June 26, 1978. *Contra, St. John's Hospital & School of Nursing, Inc. v. NLRB*, 557 F2d 1368 (10th Cir. 1977); *Baylor University Medical Center v. NLRB*, 578 F2d 351 (D.C. Cir. 1978), *petition for cert. filed*, No. 78-80, July 13, 1978. In his opinion for the Court in *Beth Israel* Mr. Justice Brennan carefully emphasized, however, that the Court was limiting its decision to the particular record before it and that it was in no way sanctioning perfunctory, a priori analysis by the Board in other hospital no-solicitation rule cases. The Court's opinion concludes:

> "We therefore hold that the Board's general approach requiring health-care facilities to permit employee solicitation and distribution during nonworking time and nonworking areas, *where the facility has not justified the prohibitions as*

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[2] Unlike *Beth Israel*, however, where only that portion of the hospital's no-solicitation rule prohibiting employees from soliciting other employees even during non-working time *in the hospital's eating facilities* was before the Court, in the instant case Baptist Hospital's full no-solicitation rule banning employees from soliciting other employees in *any* area of the Hospital which is accessible to patients or their visitors including such areas as corridors, elevators, lobbies, gift shop, as well as public cafeteria, etc. is squarely before the Court. The Board's argument in its Petition that this case should be remanded to the Court of Appeals for "reconsideration" in light of the Court's *narrower* decision in *Beth Israel* is therefore inapposite.

necessary to avoid disruption of health care operations or disturbance of patients, is consistent with the Act. We hold further that, with respect to the application of that principle to petitioner's cafeteria, the Board was appropriately sensitive to the importance of petitioner's interest in maintaining a tranquil environment for patients. . . . The Court of Appeals did note, however, that the Board's guidelines are still in flux and are far from self-defining, concluding and *we agree, that*:

> 'The Board [bears] a heavy continuing responsibility to review its policies concerning organizational activity in various parts of hospitas. Hospitals carry on a public function of the utmost seriousness and importance. They give rise to unique considerations that do not apply in the industrial setting with which the Board is more familiar. The Board should stand ready to revise its rulings if future experience demonstrates that the well-being of patients is in fact jeopardized.' " (Emphasis added)
>
> 93 S.Ct. at 2477.

The concurring opinions of Mr. Justice Powell (joined by Mr. Chief Justice Burger and Mr. Justice Rehnquist) and Mr. Justice Blackman (joined by Mr. Chief Justice Burger and Mr. Justice Rehnquist) also clearly emphasize the narrowness of the Court's holding as based upon unique circumstances at Beth Israel Hospital. 93 S.Ct. 2477-2482. Baptist Hospital respectfully submits that as supported in the record below the instant case is manifestly distinguishable from *Beth Israel* and the Board's summary reliance upon *Beth Israel* as the basis for the instant Petition is therefore misplaced. The Hospital further submits that based on the record before it the instant case was correctly decided by the Court of Appeals for the Sixth Circuit with full consideration of the identical factors outlined by the Court in *Beth Israel*. The Hospital respectfully urges, therefore, that no

purpose would be served by granting certiorari in the instant case.

Among the many significant differences distinguishing this case from *Beth Israel* is the fact that the cafeteria in Baptist Hospital is a far more typical "public" cafeteria routinely utilized by employees, patients, and their visitors alike. Unlike *Beth Israel* there is no evidence in the instant record suggesting that as few as 1.56% of the cafeteria's patrons are patients while only an additional 9% are visitors. These statistics were characterized as being of "critical significance" by Mr. Justice Brennan in his opinion for the Court in *Beth Israel* (98 S.Ct. at 2474) and are wholly lacking in the Board's evidence in this case. While there is no comparable statisical evidence available in the case *sub judice* the evidence which *was* introduced included expert medical testimony emphasizing the Hospital's policy of encouraging controlled mobility among the patients at the Hospital thereby suggesting a greatly different pattern of cafeteria utilization at Baptist Hospital. Appendix pp. 353-356, 367-369. Further distinguishing the cafeteria situation at Baptist Hospital is the fact that there was no comparable evidence in this case suggesting that the Hospital's cafeteria constitutes the normal "gathering area" for the Hospital's employees. Indeed, unlike *Beth Israel* where the Court accepted the Administrative Law Judge's finding that there were "relatively few places" where employees could congregate or meet on hospital grounds or in the nearby vicinity for the purpose of discussing non-work related matters (98 S.Ct. at 2468), the Sixth Circuit expressly found that Baptist Hospital still has a "large number" of areas including several employee lounges, some twenty-eight utility rooms and twenty-six nurses stations which are closed to patients and the public where its no-solicitation rule does not apply. 576 F2d at 108, 111. The Court below aptly noted that there was uncontradicted testimony in the instant record indicating that employees have openly solicited for a union in these areas without interference by the Hospital. 576 F2d at 108.

Additional factors distinguish the record in the instant case. In *Beth Israel* the Court emphasized how the hospital had ignored its asserted fears and utilized its cafeteria for other types of solicitation unrelated to unionization. 98 S.Ct. at 2468. There is no such showing in the instant record. Similarly, in *Beth Israel* the Court noted evidence indicating that the hospital had at one time tolerated employee solicitation in its cafeteria without any documented disturbances. 98 S.Ct. at 2474. In the instant case the record includes uncontradicted testimony by one of General Counsel's own witnesses acknowledging that his union solicitation had already resulted in untoward incidents involving open expression of hostility between employees for and against a union. Appendix pp. 396-400. The Court in *Beth Israel* also noted that there was evidence indicating that the hospital had previously confined its concern that patients might overhear employee cafeteria conversation to simply cautioning its staff to lower their voices rather than eliminating such conversation altogether. 98 S.Ct. at 2474, footnote 20. In the instant case the record not only fails to include any similar showing but the evidence is undisputed that Baptist Hospital further substantiated the sincerity of its concern that patients might be exposed to the disconcerting themes of union solicitation by also prohibiting its management staff from engaging in anti-union conversations in these same areas of the Hospital where they might be overheard by patients or their visitors. Appendix pp. 165-166.

Finally, and perhaps most importantly, contrary to *Beth Israel* where the hospital offered no affirmative evidence substantiating the necessity for its no-solicitation rule, the record in the instant case includes highly pertinent and wholly uncontradicted expert testimony supporting the medical necessity for Baptist Hospital's no-solicitation rule. As summarized in the Sixth Circuit's decision:

> "Two members of the medical staff of the hospital testified. Both were experienced physicians and engaged in private practice. Dr. Russel T. Birmingham testified that it was important to shield patients from emotional problems because the attitude of a patient and the patient's family have 'a great deal to do with recovery' of the patient. The witness stated that the need to maintain a tranquil atmosphere is not limited to treatment areas, since patients are permitted to move around in all areas of the hospital. If the union activity should become 'volatile or hostile in any form' it was Dr. Birmingham's opinion that such activity would have a potential for affecting patients and their families adversely.
>
> Dr. Greer Ricketson testified that any 'non professional attitude' among hospital employees is upsetting to patients. He stated that patients and their families are disturbed when people who are supposed to be taking care of them seem to have their minds on other things. The witness, who was chief of the medical staff of the hospital at the time of the hearing, stated emphatically that the rule and the reasons for the rule apply equally to all solicitations. Explaining the need for a rule which covers the entire working and public access area of the hospital, Dr. Ricketson referred to the present-day mobility of patients and the fact that an event which disturbs the visiting family invariably gets back to the patient.
>
> *No evidence was introduced which contradicted in any way the testimony of the two doctors that important medical reasons exist for maintaining the no-solicitation rule of the hospital.*" (Emphasis added)
>
> 576 F2d at 108-109.

It is submitted, therefore, that even accepting the Board's premise in the instant case that the Court's decision in *Beth Israel* requires a hospital to justify a no-solicitation rule extending beyond "immediate patient care areas" of a hospital, this totally unrebutted expert medical testimony not found in

the record of *Beth Israel* clearly satisfies this burden in the instant case.

In summary, in opposing the instant Petition for Certiorari Baptist Hospital emphasizes both the narrowness of the Court's prior decision and the numerous differences which distinguish the instant case from *Beth Israel*. The Hospital respectfully submits that the Court of Appeals for the Sixth Circuit gave proper consideration to the identical factors found relevant in *Beth Israel* and on the record before it properly concluded that substantial evidence failed to support the Board's conclusion that Baptist Hospital had not justified its no-solicitation rule. Quoting once more from Mr. Justice Brennan's opinion for the Court in *Beth Israel*:

> "Insofar as petitioner's challenge is to the substantiality of the evidence supporting the Board's conclusions, this Court's review is of course limited.
>
> > '*Whether on the record as a whole there is substantial evidence to support agency findings is a question Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance where the standard appears to have been misapprehended or grossly misapplied.*' Universal Camera Corp. v. NLRB, 340 U.S. 474, 491, 95 L.Ed. 456, 71 S.Ct. 456 (1951)." (Emphasis added)
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> 98 S.Ct. at 1471.

Baptist Hospital respectfully submits that in light of these highly significant differences in the evidence in this case and *Beth Israel* the two cases are both distinguishable and fully reconcilable. The Hospital respectfully urges that just as in *Beth Israel* the Court should affirm the Court of Appeals' assessment of the substantiality of the evidence before it by denying the instant Petition.

CONCLUSION

For the foregoing reasons, Baptist Hospital respectfully submits that the Petition for a Writ of Certiorari should be denied as raising no issue warranting the Court's review.

Respectfully submitted,

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